



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

US EPA RECORDS CENTER REGION 5



584380

REPLY TO THE ATTENTION OF:

**NOTICE LETTER  
URGENT LEGAL MATTER -- PROMPT REPLY NECESSARY  
CERTIFIED MAIL: RETURN RECEIPT REQUESTED**

March 18, 2004

FirstEnergy Corp.  
c/o Douglass Weber, Esq.  
76 South Main Street  
Akron, OH 44308-1809

Re: Mahoningside Power Plant  
Trumbull County, Warren, Ohio (the "site")

Dear Mr. Weber:

This letter notifies you of response activities at the site which are planned for this spring and provides an opportunity to negotiate an administrative order to undertake this work. This letter notifies you of potential liability, as defined by Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9607(a), as amended (CERCLA), that you may incur or may have incurred with respect to the above referenced site.

**NOTICE OF POTENTIAL LIABILITY**

The United States Environmental Protection Agency (EPA) has documented the release or threatened release of hazardous substances, pollutants, or contaminants at the above-referenced site. EPA has spent, and is considering spending, public funds on actions to investigate and control such releases or threatened releases at the site. Unless EPA reaches an agreement under which you will properly perform or finance such action, EPA may perform these actions pursuant to Section 104 of CERCLA.

Under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. Sections 9606(a) and 9607(a), Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. Section 6973, as amended, and other laws, potentially liable parties may be ordered to perform response actions deemed necessary by EPA to protect the public health, welfare or the environment, and may be liable for all costs incurred by the government in responding to any release or threatened release at the site. Such actions and costs may include investigations, planning, response oversight, and

enforcement activities. In addition, potentially liable parties may be required to pay for damages for injury to, destruction of or loss of natural resources, including the cost of assessing such damages.

EPA has evaluated information in connection with the investigation of the site. Based on this information, EPA believes that you may be a potentially responsible party (PRP) with respect to this site. First Energy's predecessor, Ohio Edison owned the Site property from 1950 until 1980 and operated a coal-burning power plant at the Site from 1950 until 1968. Ohio Edison leased the Mahoningside property to Summit-Warren Industries from approximately 1977 to 1980. Summit-Warren was operated by Harold Glunt and John Petrilla and primarily scrapped or sold the inventory left on the property by Ohio Edison. Mr. Petrilla has stated to EPA investigators that transformers left on the facility by Ohio Edison were scrapped by Mr. Petrilla and that oil from those transformers was spilled on the ground and used for burning covers off of copper cable. An owner at the time of disposal is a category of liability as defined under CERCLA.

### **NOTICE AND NEGOTIATION MORATORIUM**

EPA has the discretionary authority to use notice procedures, if EPA determines that such procedures would facilitate an agreement between EPA and the PRPs and would expedite remedial action at the site. Use of the notice procedures provides a period of time when PRPs and EPA may enter into formal negotiations for PRP conduct or financing of the response activities at the site. If you are interested in negotiating an agreement with EPA, you will need to notify us before March 19, 2004. This notification should be sent to the Site attorney, Richard Nagle, 77 W. Jackson Blvd. (C-14J), Chicago, Illinois 60604. The 60-day negotiation period for this Site ends on May 13, 2004. If settlement is reached between EPA and the PRPs within the 60-day negotiation period, the settlement will be embodied in a consent order.

### **WORK PLAN AND DRAFT ADMINISTRATIVE ORDER**

A copy of EPA's draft work plan and draft administrative order are attached. The information is provided to assist you in discussions with EPA staff. Work conducted by PRPs must be conducted according to a signed administrative order and an EPA approved work plan.

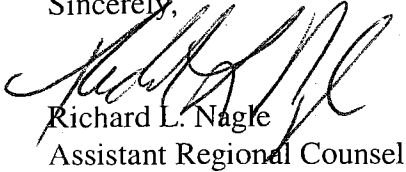
### **DEMAND FOR PAYMENT**

With this letter, EPA demands that you reimburse EPA for its costs incurred to date, and encourages you to voluntarily negotiate a consent agreement in which you pay past costs and undertake the response action. In accordance with CERCLA, EPA already has undertaken certain actions and incurred certain costs in response to conditions at the site. These response actions include PCB contaminated soil removal. The cost to date of the response actions performed at the site through EPA funding is approximately \$1.48 million. In accordance with Section 107(a) of CERCLA, demand is hereby made for payment of the above amount plus any and all interest recoverable under Section 107 or under any other provisions of law. You are potentially liable for additional costs plus interest if EPA conducts additional activities at the site.

While EPA has received some positive feedback from First Energy regarding the work proposed at the site, in order to accomplish the necessary work in this construction season, we need to move forward expeditiously. The factual and legal discussions contained in this letter are intended solely for notification and information purposes. They are not intended to be and cannot be relied upon as final EPA positions on any matter set forth herein.

If you or your staff have any questions pertaining to this matter, please feel free to contact me at (312) 353-8222.

Sincerely,



Richard L. Nagle  
Assistant Regional Counsel

Attachment

cc: Edward Harrison  
Senior Engineer, Environmental Department  
First Energy Co.  
76 South Main Street  
Akron, OH 44308

Mark Durno ME-W  
Kaushala Khanna SE-5J

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF: )

Mahoningside Power Plant Site )  
Trumbull County, Warren, Ohio )

Respondent: )

First Energy )  
\_\_\_\_\_ )

ADMINISTRATIVE ORDER ON  
CONSENT FOR REMOVAL ACTION

Docket No. \_\_\_\_\_

Proceeding Under Sections 104, 106(a), 107  
and 122 of the Comprehensive  
Environmental Response, Compensation,  
and Liability Act, as amended, 42 U.S.C. §§  
9604, 9606(a), 9607 and 9622

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## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("U.S. EPA") and Respondent. This Order provides for the performance of removal actions by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with the Mahoningside Power Plant Site located at, 650 Summit Street, Warren, Trumbull County, Ohio ("Site").

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA").

3. U.S. EPA has notified the State of Ohio (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. U.S. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon U.S. EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Order.

6. Respondent is liable for carrying out all activities required by this Order.

7. Respondent shall ensure that its contractors, subcontractors, and representatives comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

## **III. DEFINITIONS**

8. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning

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assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

b. "Effective Date" shall be the effective date of this Order as provided in Section XXXII.

c. "Future Response Costs" shall mean all costs, including direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including, but not limited to, payroll costs, contraction costs, travel costs, laboratory costs, and the costs incurred pursuant to Paragraphs 24 and/or 34. Future Response Costs shall also include all costs, including direct and indirect costs, incurred prior to the Effective Date, but paid after that date and all costs, including direct and indirect costs, paid by the United States in connection with the Site between March 1, 2004, and the Effective Date.

d. "Interest" shall mean interest at the rate specified for interest on investments of the U.S. EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

e. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

f. "Order" shall mean this Administrative Order on Consent and all appendices attached hereto (listed in Section XXXI). In the event of conflict between this Order and any appendix, this Order shall control.

g. "Parties" shall mean U.S. EPA and Respondent.

h. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through February 29, 2004, plus interest on all costs through such date.

i. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

j. "Site" shall mean the Mahoningside Power Plant Superfund Site, encompassing

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approximately 6 acres, located at 650 Summit Street, Warren, Trumbull County, Ohio (see attached map as Attachment B).

k. "State" shall mean the State of Ohio.

l. "U.S. EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

m. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3), and any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

n. "Work" shall mean all activities Respondent is required to perform under this Order.

#### **IV. FINDINGS OF FACT**

9. Based on available information, including the Administrative Record in this matter, U.S. EPA hereby finds that:

a. The Mahoningside Power Plant Superfund Site is located in a mixed commercial, industrial and residential area of Warren, Ohio. The property is located at 650 Summit Street, Warren, Trumbull County, Ohio, 44483. The Site consists of an open abandoned basement of a former power plant building, small service buildings, and debris piles. The basement structure contains numerous underfloor sumps, piping, and conduits, some of which are connected to the Mahoning River. The building foundation encompasses approximately 34,000 square feet and the property totals approximately 6 acres. The property is bordered by the Mahoning River to the east, railroad tracks to the north, light industrial properties to the south, and a residential area to the west. Summit Street parallels the facility to the south and Tod Avenue parallels the facility to the west.

b. The facility was built in 1904 by the Warren Water and Light Company as a hydro-electric power generating plant. From 1950 until 1980 the facility was owned by the Ohio Edison Company and primarily used as a coal-burning power plant until 1968. In August 1977, the property was leased by Ohio Edison to Summit-Warren, Inc., where the property was used to operate a salvage business. At that time, the business was owned and/or operated by Harold Glunt and John Petrilla. In December 1980, the property was sold to Nestor Stychno and William Marsteller. In 1999, a bankruptcy agreement between the former property owners and the City of Warren was established to turn the property over to the city.

c. In February 1999, City of Warren contractors, Inner-scope Technologies and



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McCabe Engineering, mobilized to begin demolition and general construction activities at the Mahoningside Power Plant Site. On March 17, 1999, two 250-foot high smokestacks were imploded by explosives. General demolition activities continued until November 1999.

d. In November 1999, Warren consulted with Ohio EPA and U.S. EPA regarding regulatory compliance should PCBs or heavy metal contamination be discovered during the removal of basement debris. From December 1999, through early March 2000, debris removal from the basement progressed. All PCB contamination that was discovered during this time was below the TSCA regulatory level of 50 parts per million (ppm) for industrial facilities. In March 2000, PCB contamination, exceeding 50 ppm, was discovered in the basement of the former facility. Approximately 450 cubic yards of PCB-contaminated debris was contained on-site.

e. From March 2000 through June 2000, the City of Warren authorized response actions to control and contain PCB contamination. In mid-June 2002, the City of Warren ran out of funding to complete the PCB clean-up and remainder of demolition activity. The City of Warren's contractor, McCabe Engineering, continued basement de-watering and treatment actions on a good-faith basis.

f. On July 21, 2000, the City of Warren requested U.S. EPA assistance to complete the removal and disposal of hazardous materials at the Site and to take over the de-watering operation. On August 4, 2000, U.S. EPA initiated an emergency removal action to continue the de-watering activities on Site.

g. From October 10, 2000 until late-February 2001, U.S. EPA conducted a time-critical removal at the site. U.S. EPA and its contractors removed high-level PCB contamination from the basement and sub-structure of the former power plant and disposed of PCB contaminated debris which was previously contained. Approximately 1,770 tons of PCB contaminated materials were removed from the site and disposed of at CWM-Chemical Services LLC Landfill located in Model City, New York.

h. In March 2001, U.S. EPA referred the Site to Ohio EPA for further assessment. In July 2001, Ohio EPA conducted an assessment of the Site which included multi-media sampling. Sampling results indicated that a portion of one debris pile exhibited PCB concentrations as high as 159 mg/kg (ppm), exceeding the regulatory limit of 50 ppm.

i. In June and July of 2002, the City of Warren's contractor, McCabe Engineering, collected grid-based composite samples from the piles at various depth intervals. The results of this characterization indicated that elevated levels of PCB's were present in all three debris piles. Also, the characterization showed that two of the three piles had PCB contamination in excess of 50 ppm in some locations.

j. On January 24, 2003, the City of Warren again requested U.S. EPA's assistance to dispose of PCB contaminated debris from the Site. The City of Warren has offered to provide

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services to load-out contaminated materials and to provide after-action confirmation sampling.

## **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

10. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, U.S. EPA has determined that:

a. The The Mahoningside Power Plant Superfund Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes polychlorinated biphenyls (PCBs), a "hazardous substance" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. The Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. The Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for performance of response action and for response costs incurred and to be incurred at the Site.

i. Respondent (First Energy formerly called Ohio Edison) was the owner" and "operator" of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

ii. Respondent (First Energy) was the owner and operator of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2); and/or a person who arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the facility, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3); and/or a person who accept or accepted hazardous substances for transport to the facility, within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility into the "environment" as defined by Sections 101(22) and 101(8) of CERCLA, 42 U.S.C. §§ 9601(22) and 9601(8).

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f. The conditions present at the Site constitute a threat to public health, welfare, or the environment based upon the factors set forth in Section 300.415(b)(2) of the National Oil and Hazardous Substances Pollution Contingency Plan, as amended ("NCP"), 40 CFR §300.415(b)(2). These factors include, but are not limited to, the following:

- i Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances, pollutants or contaminants: this factor is present at the Site due to marginal condition of the security fence which surrounds the facility and the presence of three debris/soil piles contaminated with high levels of PCBs at the Site property. Also, the Site is situated in a high traffic, mixed industrial-residential area. There have been recent reported cases of unauthorized entry and vandalism at the Site. Therefore, human and animal exposure pathways present at the Site include direct contact or ingestion of contaminated soil. Hence, the Site may pose a potential threat to nearby populations, animals and surrounding environment.
- ii Actual or potential contamination of drinking water supplies or sensitive ecosystem: this factor is present at the Site due to the existence of three debris/soil piles contaminated with high levels of PCB hazardous substances. The soil piles are neither staged on an impermeable liner nor are covered. Thus, the PCBs in soil piles are uncontrolled and have the ability to migrate through soil to ground water which may contaminate drinking water and/or migrate to the nearby Mahoning River.
- iii Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released: this factor is present at the Site due to presence of uncovered contaminated soil piles and the presence of the Mahoning River which borders the Site to the east. Northeast Ohio typically exhibits frequent precipitation in the fall, winter, and spring months. Rain events may increase the potential of PCB contaminated, uncovered soil piles to migrate off-site which may eventually may contaminate the Mahoning River. Additionally, much of the material in the soil piles are fine particles that can easily migrate to nearby residential areas during high wind conditions
- iv The unavailability of other appropriate federal or state response mechanisms to respond to the release: this factor supports the actions required by this Order at the Site because of the limited State and City funds. Therefore, on January 24, 2003, the City of Warren requested assistance of U.S. EPA to dispose of PCB contaminated debris/soil piles from the Site.

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g. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VI. ORDER**

10. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR**

11. Respondent shall retain one or more contractors to perform the Work and shall notify U.S. EPA of the name(s) and qualifications of such contractor(s) within 5 business days of the Effective Date. Respondent shall also notify U.S. EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least 5 business days prior to commencement of such Work. U.S. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If U.S. EPA disapproves of a selected contractor, Respondent shall retain a different contractor and shall notify U.S. EPA of that contractor's name and qualifications within 3 business days of U.S. EPA's disapproval. The contractor must demonstrate compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared consistent with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B0-1/002), or equivalent documentation as required by U.S. EPA.

12. Within 5 business days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Order and shall submit to U.S. EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. U.S. EPA retains the right to disapprove of the designated Project Coordinator. If U.S. EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify U.S. EPA of that person's name, address, telephone number, and qualifications within 4 business days following U.S. EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from U.S. EPA relating to this Order shall constitute receipt by all Respondent.

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13. U.S. EPA has designated Mark Durno of the Emergency Response Branch, Region 5, as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Order, Respondent shall direct all submissions required by this Order to the OSC at 25089 Center Ridge Road, Mail Code: ME-W, Westlake, Ohio 44145. Respondent is encouraged to make its submissions to U.S. EPA on recycled paper (which includes significant postconsumer waste paper content where possible) and using two-sided copies.

14. U.S. EPA and Respondent shall have the right, subject to Paragraph 12, to change their respective designated OSC or Project Coordinator. U.S. EPA shall notify the Respondent, and Respondent shall notify U.S. EPA, as early as possible before such a change is made, but in no case less than 24 hours before such a change. The initial notification may be made orally but it shall be promptly followed by a written notice.

### **VIII. WORK TO BE PERFORMED**

15. Respondents shall perform, at a minimum, the following removal activities:

- a. Develop and implement a Site-specific Health and Safety Plan.
- b. Establish and maintain Site security.
- c. Develop and implement a sampling and segregation plan to separate high level PCB contamination (>50 ppm per discrete location or applicable standard based on Statement of Work) from low-level PCB contamination from the debris piles.
- d. Dispose of hazardous substances generated during the construction or operation of the removal action required by this Consent Order at approved off-Site disposal facilities in accordance with the U.S. EPA Off-Site Rule, 40 C.F.R. Section 300.440, 58 Fed. Reg. 49215 (Sept. 22, 1993). This includes off-site disposal of both high level PCB contamination to a Toxic Substances Control Act (TSCA) and, low-level PCB contamination to an appropriate non-hazardous waste landfill
- e. Stage remaining materials, if applicable, on an impermeable liner and cover.
- f. Conduct post-removal sampling and analysis to verify completion of the removal action.

16. Work Plan and Implementation.

a. Within 10 business days after the Effective Date, Respondent shall submit to U.S. EPA for approval a draft Work Plan for performing the removal action generally described in Paragraph 15 above. The draft Work Plan shall provide a description of, and an expeditious

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schedule for, the actions required by this Order.

b. U.S. EPA may approve, disapprove, require revisions to, or modify the draft Work Plan in whole or in part. If U.S. EPA requires revisions, Respondent shall submit a revised draft Work Plan within 7 business days of receipt of U.S. EPA's notification of the required revisions. Respondent shall implement the Work Plan as approved in writing by U.S. EPA in accordance with the schedule approved by U.S. EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Order.

c. Respondent shall not commence any Work except in conformance with the terms of this Order. Respondent shall not commence implementation of the Work Plan developed hereunder until receiving written U.S. EPA approval pursuant to Paragraph 15(b).

17. Health and Safety Plan. Within 10 business days after the Effective Date, Respondent shall submit for U.S. EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site work under this Order. This plan shall be prepared consistent with U.S. EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If U.S. EPA determines that it is appropriate, the plan shall also include contingency planning. Respondent shall incorporate all changes to the plan recommended by U.S. EPA and shall implement the plan during the pendency of the removal action.

18. Quality Assurance and Sampling.

a. All sampling and analyses performed pursuant to this Order shall conform to U.S. EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate U.S. EPA guidance. Respondent shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by U.S. EPA. U.S. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements. The QAPP should be prepared in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001), and "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998).

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b. Upon request by U.S. EPA, Respondent shall have such a laboratory analyze samples submitted by U.S. EPA for QA monitoring. Respondent shall provide to U.S. EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by U.S. EPA, Respondent shall allow U.S. EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify U.S. EPA not less than 3 business days in advance of any sample collection activity, unless shorter notice is agreed to by U.S. EPA. U.S. EPA shall have the right to take any additional samples that U.S. EPA deems necessary. Upon request, U.S. EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent's implementation of the Work.

19. Post-Removal Site Control. In accordance with the Work Plan schedule, or as otherwise directed by U.S. EPA, Respondent shall submit a proposal for post-removal site control consistent with Section 300.415(l) of the NCP and OSWER Directive No. 9360.2-02. Upon U.S. EPA approval, Respondent shall implement such controls and shall provide U.S. EPA with documentation of all post-removal site control arrangements.

20. Reporting.

a. Respondent shall submit a written progress report to U.S. EPA concerning actions undertaken pursuant to this Order every 30th day after the date of receipt of U.S. EPA's approval of the Work Plan until termination of this Order, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondent shall submit 3 copies of all plans, reports or other submissions required by this Order, or any approved work plan. Upon request by U.S. EPA, Respondent shall submit such documents in electronic form.

c. If Respondent owns or controls property at the Site, Respondent shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Order and written notice to U.S. EPA and the State of Ohio of the proposed conveyance, including the name and address of the transferee. If Respondent who owns or controls property at the Site, Respondent agrees to require that their successors comply with the immediately preceding sentence and Sections IX (Site Access) and X (Access to Information).

21. Final Report. Within 60 calendar days after completion of all Work required by

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Section VIII of this Order, Respondent shall submit for U.S. EPA review a final report summarizing the actions taken to comply with this Order. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports" and with the guidance set forth in "Superfund Removal Procedures: Removal Response Reporting – POLREPS and OSC Reports" (OSWER Directive No. 9360.3-03, June 1, 1994). The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Order, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

22. Off-Site Shipments.

a. Respondent shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the On-Scene Coordinator. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Respondent shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the removal action. Respondent shall provide the information required by Paragraph 21(a) and 21(b) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondent shall obtain U.S. EPA's certification that the



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proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

## **IX. SITE ACCESS**

23. If the Site, or any other property where access is needed to implement this Order, is owned or controlled by the Respondent, the Respondent shall, commencing on the Effective Date, provide U.S. EPA, the State, and their representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order.

24. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within 10 business days after the Effective Date, or as otherwise specified in writing by the OSC. Respondent shall immediately notify U.S. EPA if after using its best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing their efforts to obtain access. U.S. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as U.S. EPA deems appropriate. Respondent shall reimburse U.S. EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

25. Notwithstanding any provision of this Order, U.S. EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

## **X. ACCESS TO INFORMATION**

26. Respondent shall provide to U.S. EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to U.S. EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

27. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to U.S. EPA under this Order to the extent permitted by and

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in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by U.S. EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to U.S. EPA, or if U.S. EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

28. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent assert such a privilege in lieu of providing documents, it shall provide U.S. EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

29. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## **XI. RECORD RETENTION**

30. Until 6 years after Respondent's receipt of U.S. EPA's notification pursuant to Section XXIX (Notice of Completion of Work), each Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 6 years after Respondent's receipt of U.S. EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

31. At the conclusion of this document retention period, Respondent shall notify U.S. EPA at least 60 days prior to the destruction of any such records or documents, and, upon request by U.S. EPA, Respondent shall deliver any such records or documents to U.S. EPA. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent assert such a privilege, it shall provide U.S. EPA with the following: 1) the title of the document,

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record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

32. Respondent hereby certifies that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by U.S. EPA or the State or the filing of suit against it regarding the Site and that it has fully complied and will fully comply with any and all U.S. EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XII. COMPLIANCE WITH OTHER LAWS**

33. Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by U.S. EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws. Respondent shall identify ARARs in the Work Plan subject to U.S. EPA approval.

## **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

34. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer, Emergency Response Branch, Region 5 at (312) 353-2318, of the incident or Site conditions. In the event that Respondent fail to take appropriate response action as required by this Paragraph, and U.S. EPA takes such action instead, Respondent shall reimburse U.S. EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

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35. In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the OSC at (312) 353-2318 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to U.S. EPA within 7 business days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

#### **XIV. AUTHORITY OF ON-SCENE COORDINATOR**

36. The OSC shall be responsible for overseeing Respondent's implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

#### **XV. PAYMENT OF RESPONSE COSTS**

37. a. Within 30 days after the Effective Date, Respondent shall pay to U.S. EPA \$1.48 million for Past Response Costs. Payment shall be made to U.S. EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Respondent by U.S. EPA Region 5, and shall be accompanied by a statement identifying the name and address of the party making payment, the Site name, and Site/Spill ID, and the U.S. EPA docket number for this action. Payment shall be made by certified or cashier's check made payable to "U.S. EPA Hazardous Substance Superfund." Each check, or a letter accompanying each check, shall identify the name and address of the party making payment, the Site name, and Site/Spill ID Number and the U.S. EPA docket number for this action, and shall be sent to:

U.S. Environmental Protection Agency  
Program Accounting & Analysis Section  
P.O. Box 70753  
Chicago, Illinois 60673

b. At the time of payment, Respondent shall send notice that such payment has been made to the Director, Superfund Division, U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604-3590 and to Richard Nagle, Associate Regional Counsel, 77 West Jackson Boulevard, C-14J, Chicago, Illinois, 60604-3590.

c. The total amount to be paid by Respondent pursuant to Paragraph 37(a) shall be deposited in the U.S. EPA Hazardous Substance Superfund.

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38. Payments for Future Oversight Costs.

a. Respondent shall pay U.S. EPA Future Oversight Costs not inconsistent with the NCP in advance. U.S. EPA has determined that the Future Response Costs for the Site are \$50,000. Respondent shall make this separate payment within 30 days of the Effective Date of this Order. Respondent waives all rights to dispute all or part of the Future Oversight Costs paid under this Order.

b. Respondent shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "U.S. EPA Hazardous Substance Superfund, referencing the name and address of the party making payment and U.S. EPA Site/Spill ID number (B5P4) and. Respondent shall send the check(s) to:

U.S. Environmental Protection Agency  
Mahoningside Site Future Oversight Costs Special Account  
Program Accounting & Analysis Section  
P.O. Box 70753  
Chicago, Illinois 60673

c. At the time of payment, Respondent shall send notice that payment has been made to the Director, Superfund Division, U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604-3590 and to Richard Nagle, Associate Regional Counsel, 77 West Jackson Boulevard, C-14J, Chicago, Illinois, 60604-3590.

d. The total amount to be paid by Respondent pursuant to Paragraph 38(a) shall be deposited in the Mahoningside Power Plant Special Account within the U.S. EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by U.S. EPA to the U.S. EPA Hazardous Substance Superfund.

39. In the event that the payment for Past Response Costs is not made within 30 days of the Effective Date, or the payments for Future Oversight Costs are not paid within 30 days of the Effective Date, Respondent shall pay Interest on the unpaid balance. The Interest on Past Response Costs and Future Oversight Costs shall begin to accrue on the Effective Date and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

**XVI. DISPUTE RESOLUTION**

40. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order

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expeditiously and informally.

41. If Respondent objects to any U.S. EPA action taken pursuant to this Order, it shall notify U.S. EPA in writing of their objections within 10 calendar days of such action, unless the objection(s) has/have been resolved informally. This written notice shall include a statement of the issues in dispute, the relevant facts upon which the dispute is based, all factual data, analysis or opinion supporting Respondent's position, and all supporting documentation on which such party relies. U.S. EPA shall submit its Statement of Position, including supporting documentation, no later than 10 calendar days after receipt of the written notice of dispute. In the event that these 10-day time periods for exchange of written documents may cause a delay in the work, they shall be shortened upon, and in accordance with, notice by U.S. EPA. The time periods for exchange of written documents relating to disputes over billings for response costs may be extended at the sole discretion of U.S. EPA. An administrative record of any dispute under this Section shall be maintained by U.S. EPA. The record shall include the written notification of such dispute, and the Statement of Position served pursuant to the preceding paragraph. Upon review of the administrative record, the Director of the Superfund Division, U.S. EPA Region 5, shall resolve the dispute consistent with the NCP and the terms of this Order.

42. Respondent's obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with U.S. EPA's decision, whichever occurs.

## **XVII. FORCE MAJEURE**

43. Respondent agrees to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

44. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondent shall notify U.S. EPA orally within 24 hours of when Respondent first knew that the event might cause a delay. Within 7 calendar days thereafter, Respondent shall provide to U.S. EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an

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endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall be grounds for U.S. EPA to deny Respondent an extension of time for performance. Respondent shall have the burden of demonstrating by a preponderance of the evidence that the event is a *force majeure*, that the delay is warranted under the circumstances, and that best efforts were exercised to avoid and mitigate the effects of the delay.

45. If U.S. EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by U.S. EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If U.S. EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, U.S. EPA will notify Respondent in writing of its decision. If U.S. EPA agrees that the delay is attributable to a *force majeure* event, U.S. EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

### **XVIII. STIPULATED PENALTIES**

46. Respondent shall be liable to U.S. EPA for stipulated penalties in the amounts set forth in Paragraphs 47 and 48 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, the SOW, and any plans or other documents approved by U.S. EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

#### **47. Stipulated Penalty Amounts - Work.**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 47(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$200	1st through 14th day
\$500	15th through 30th day
\$1,000	31st day and beyond

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b. Compliance Milestones

Specific work products or work initiation points that are subject to the stipulated penalties above include:

- 1) An original and any revised work plan.
- 2) An original and any revised sampling and analysis plan.
- 3) Initiation of the removal Work
- 4) Completion of the removal Work
- 5) Final Work Completion Report

48. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate interim or progress reports:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$100	1st through 14th day
\$200	15th through 30th day
\$500	31st day and beyond

49. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after U.S. EPA's receipt of such submission until the date that U.S. EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the Director of the Superfund Division, Region 5, under Paragraph 41 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after U.S. EPA submits its written statement of position until the date that the Director of the Superfund Division issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

50. Following U.S. EPA's determination that Respondent has failed to comply with a requirement of this Order, U.S. EPA may give Respondent a written notification of the failure and describe the noncompliance. U.S. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether U.S. EPA has notified Respondent of a violation.

51. All penalties accruing under this Section shall be due and payable to U.S. EPA within 30 days of Respondent's receipt from U.S. EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to U.S. EPA under this Section shall be paid by certified or cashier's check(s) made payable to "U.S. EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Program Accounting & Analysis Section, P.O. Box 70753, Chicago, Illinois



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60673, shall indicate that the payment is for stipulated penalties, and shall reference the U.S. EPA Site/Spill ID Number (B5P4), the U.S. EPA Docket Number, and the name and address of the party making payment. Copies of checks paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to U.S. EPA as provided in Paragraph 37(c).

52. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Order.

53. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 20 days after the dispute is resolved by agreement or by receipt of U.S. EPA's decision.

54. If Respondent fails to pay stipulated penalties when due, U.S. EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 51. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of U.S. EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that U.S. EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order. Should Respondent violates this Order or any portion hereof, U.S. EPA may carry out the required actions unilaterally, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and/or may seek judicial enforcement of this Order pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606. Notwithstanding any other provision of this Section, U.S. EPA may, in its unreviewable discretion, waive in writing any portion of stipulated penalties that have accrued pursuant to this Order.

#### **XIX. COVENANT NOT TO SUE BY U.S. EPA**

55. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Order, and except as otherwise specifically provided in this Order, U.S. EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Past Response Costs and Future Response Costs. This covenant not to sue shall take effect upon receipt by U.S. EPA of the Past Response Costs due under Section XV of this Order and any Interest or Stipulated Penalties due for failure to pay Past Response Costs as required by Sections XV and XVIII of this Order. This covenant not to sue is conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondent and does not extend to any other person.

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## **XX. RESERVATIONS OF RIGHTS BY U.S. EPA**

56. Except as specifically provided in this Order, nothing herein shall limit the power and authority of U.S. EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent U.S. EPA from seeking legal or equitable relief to enforce the terms of this Order. U.S. EPA also reserves the right to take any other legal or equitable action as it deems appropriate and necessary, or to require the Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

57. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. U.S. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Order;
- b. liability for costs not included within the definitions of Past Response Costs or Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

## **XXI. COVENANT NOT TO SUE BY RESPONDENTS**

58. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Past Response Costs, Future Response Costs, or this Order, including, but not limited to:

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a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State of Ohio Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

59. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

60. Respondent agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if U.S. EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site.

## **XXII. OTHER CLAIMS**

61. By issuance of this Order, the United States and U.S. EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or U.S. EPA shall not be deemed a party to any contract entered into by Respondent or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

62. Except as expressly provided in Section XIX (Covenant Not to Sue by U.S. EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

63. No action or decision by U.S. EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

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### **XXIII. CONTRIBUTION PROTECTION**

64. The Parties agree that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Order. The "matters addressed" in this Order are the Work, Past Response Costs, and Future Response Costs. Nothing in this Order precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

### **XXIV. INDEMNIFICATION**

65. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondents agree to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

66. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

67. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement made by Respondent for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

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## **XXV. MODIFICATIONS**

68. The OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by U.S. EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

69. If Respondent seeks permission to deviate from any approved work plan or schedule, Respondent's Project Coordinator shall submit a written request to U.S. EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 68.

70. No informal advice, guidance, suggestion, or comment by the OSC or other U.S. EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

## **XXVI. NOTICE OF COMPLETION OF WORK**

71. When U.S. EPA determines, after U.S. EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, *e.g.*, post-removal site controls, payment of Future Response Costs, and record retention, U.S. EPA will provide written notice to Respondent. If U.S. EPA determines that any such Work has not been completed in accordance with this Order, U.S. EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the U.S. EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Order.

## **XXVII. FINANCIAL ASSURANCE**

72. Within 30 days of the Effective Date, Respondent shall establish and maintain financial security in the amount of \$1 million in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;

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- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Respondent; or
- e. A demonstration that the Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

73. If Respondent seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 72(a) of this Section, Respondent shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Respondent seeks to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 72(d) or (e) of this Section, they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that U.S. EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Respondent shall, within 30 days of receipt of notice of U.S. EPA's determination, obtain and present to U.S. EPA for approval one of the other forms of financial assurance listed in Paragraph 72 of this Section. Respondent's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Order.

74. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 72 of this Section, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to U.S. EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by U.S. EPA. In the event of a dispute, Respondent may reduce the amount of the security in accordance with the written decision resolving the dispute.

75. Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and approval by U.S. EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondent may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

#### **XXVIII. ATTORNEY GENERAL APPROVAL**

76. The Attorney General or his/her designee has approved the response cost settlement embodied in this Order in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

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**XXIX. SEVERABILITY/INTEGRATION/ATTACHMENTS**

77. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

78. This Order and its attachments constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. The following attachments are incorporated into this Order: **A. Statement of Work.**

**XXX. EFFECTIVE DATE**

79. This Order shall be effective upon receipt by Respondent of a copy of this Order signed by the Director, Superfund Division, U.S. EPA Region 5. Provided, however, that Section XV shall be effective when U.S. EPA issues notice to Respondent that public comments received, if any, do not require U.S. EPA to modify or withdraw from Section XV of this Order.

The undersigned representative of Respondent certifies that he is fully authorized to enter into the terms and conditions of this Order and to bind the party they represent to this document.

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

For Respondent \_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_

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IN THE MATTER OF:

Mahoningside Power Plant Site  
Trumbull County, Warren, Ohio

It is so ORDERED and Agreed this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

BY:

\_\_\_\_\_  
Richard Karl, Acting Director  
Superfund Division  
United States Environmental Protection Agency  
Region 5



## SCOPE OF WORK

FOR PROPOSED SAMPLING PLAN FOR CHARACTERIZATION OF PILES, FOR OFF-SITE DISPOSAL OF MATERIALS AND FOR CHARACTERIZATION OF LARGE (BULK) MATERIALS THAT MAY REMAIN ON-SITE

Background:

- 3 piles of waste with the following approximate base dimensions:  
1) 200' x 100' x 11'    2) 200' x 80' x 11'    3) 100' x 60' x 7'  
– Accounting for slope, the total volume is approximately 13,000 cubic yards or about 650 (20 cubic yard) roll-offs.
- The majority of the piles is pulverized rock/brick/concrete, but there are also some large pieces of debris (i.e. blocks of concrete, metal structures).
- Some material has already been determined to be over 50 ppm, (159 ppm max.).

Disposal of material  $\geq 50$  ppm PCBs

- Material in the piles already found to contain  $\geq 50$  ppm PCBs must be disposed of at a TSCA approved landfill.
- The material in the piles considered to be  $\geq 50$  ppm PCBs must be all the material starting from the location of the sample found to be  $\geq 50$  ppm PCBs to the next sample point showing a concentration of  $< 50$  ppm PCBs in both horizontal and vertical directions. New samples may be collected and analyzed to define the horizontal and vertical boundaries.

Characterization and disposal of material  $< 50$  ppm PCBs

- Material in the piles found to contain  $< 50$  ppm PCBs may be disposed of at a State approved municipal solid waste landfill or non-municipal non-hazardous waste landfill.
- The material in the piles (remaining after the material with  $\geq 50$  ppm PCBs has been removed) must be sampled in accordance with the following procedure:

Collection of samples:

- As material from the piles is generated and placed in a roll-off container (roll-off):
  - collect 3 samples from the roll-off container, one from the bottom third, one from the middle, and one from the top third.
  - Repeat the collection of 3 samples from each roll-off for each new roll-off.
  - Composite the samples from 3 consecutively generated roll-offs, so one composite sample will contain a mix of the bottom, middle, and top samples from 3 roll-offs.
  - Analyze the composite sample representing the 3 consecutive roll-offs.

Management based on analytical results of samples:

- If the sample representing 3 consecutive roll-offs contains  $\leq 25$  ppm PCBs, the material in the 3 roll-offs may be disposed of in a State approved landfills noted above.
- If the sample contains over 25 ppm PCBs, the material in the 3 roll-offs is considered a TSCA regulated waste and either must be disposed at a TSCA approved landfill, or the 3 point composite sample (from the bottom, middle, and top thirds) from an individual roll-off may be analyzed individually.
  - If the sample representing an individual roll-off contains  $\geq 50$  ppm PCBs, the material in the roll-off must be disposed at a TSCA approved landfill.

- If the sample representing an individual roll-off contains <50 ppm PCBs, the material in the roll-off may be disposed of in a State approved landfill as noted above.

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#### Characterization sampling and action level for materials larger than 3 ft. (in any one direction)

##### Collection of samples\*:

- Separate roll-offs, or piles of an equivalent volume of a roll-off, should be used to collect different types of materials, such as bulk concrete or metals.
- Sample the roll-offs or piles as they are generated, collecting a minimum of 3 samples, but no more than 9 (n), from each roll-off or pile.
- Composite the samples from an individual roll-off or pile.
- Analyze the composite sample for PCBs

##### Management based on analytical results of samples\*:

- If the result is less than calculated value of 50 ppm divided by the number of samples comprising the composite ( $< 50/n$ ), or less than the State recommended risk-based action level, which ever is lower; then, the material from that roll-off or pile may remain on-site or be disposed of at a State approved landfill.
- If the result is greater than or equal to the calculated value of 50 ppm divided by the number of samples comprising the composite ( $\geq 50/n$ ), the material from that roll-off or pile can not remain on site.
  - If the sample representing an individual roll-off or pile contains <50 ppm PCBs, the material in the roll-off may be disposed of in a State approved landfill noted above.
  - If the sample representing an individual roll-off contains  $\geq 50$  ppm PCBs, the material in the roll-off must be disposed at a TSCA approved landfill.

\* Note: Based on the composition of the material (i.e. porous vs. non-porous) and visual observation (i.e. obvious staining) wipe sampling techniques may be recommended. The action level value for wipe sampling is  $10\mu\text{g}/100\text{cm}^2$  or the State recommended risk-based level, which ever is lower. Techniques and procedures for wipe sampling will be developed as piles (or boxes) are generated and the matrix is better defined. A plan must be generated and accepted prior to this technique being implemented.

#### Verification sampling after the pile is removed

- Six inches (6") of the soil or gravel underneath the piles must be removed and characterized and verification sampling must be conducted after excavation.
- For the verification, a large grid can be used as follows since regulated levels of PCBs are not expected to be in the soil or gravel:
 

200' x 100' x 11'	8 verification samples (grid of about 50 X 50)
200' x 80' x 11'	6 verification samples (grid of about 50 X 50)
100' x 60' x 7'	4 verification samples (grid of about 50 X 50)

#### Creation of new piles

- If any new piles are to be created during the management of the existing material, the area in which the pile is to be created should be lined with a liner that is designed, constructed, and installed to prevent any migration into the adjacent subsurface soil.